

§ 655.705 Overview of responsibilities.

Three federal agencies are involved in the process which leads to H-1B non-immigrant classification. The employer also has continuing responsibilities under the process. This section briefly describes the responsibilities of each of these entities.

(a) *Department of Labor responsibilities.* DOL administers the labor condition application process and enforcement provisions.

(1) The Employment and Training Administration (ETA), DOL, is responsible for receiving and certifying labor condition applications in accordance with subpart H of this part. ETA is also responsible for compiling and maintaining a list of labor condition applications and makes such list available for public examination at the Department of Labor, 200 Constitution Avenue, NW., room N4456, Washington, DC 20210.

(2) The Employment Standards Administration (ESA), DOL, is responsible, in accordance with subpart I of this part, for investigating and determining, pursuant to a complaint or otherwise, an employer's misrepresentation in or failure to comply with labor condition applications or the employment of H-1B nonimmigrants.

(b) *Immigration and Naturalization Service (INS) and Department of State (DOS) responsibilities.* The Immigration and Naturalization Service (INS) accepts the employer's petition (INS Form I-129) with the DOL-certified labor condition application attached. INS is responsible for approving the nonimmigrant's H-1B visa classification. In doing so, the INS determines whether the occupation named in the labor condition application is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification. If the petition is approved, INS will notify the U.S. Consulate where the nonimmigrant intends to apply for the visa unless the nonimmigrant is in the U.S. and eligible to adjust status without leaving this country. See 8 U.S.C. 1184(i). The Department of State, through U.S. Em-

bassies and Consulates, is responsible for issuing H-1B visas.

(c) *Employer's responsibilities.* Each employer seeking an H-1B non-immigrant in a specialty occupation or as a fashion model of distinguished merit and ability has several responsibilities.

(1) The employer shall submit a completed labor condition application on Form ETA 9035 and one copy to the regional office of ETA serving the area where the nonimmigrant will be employed. If the labor condition application is certified by ETA, a copy will be returned to the employer.

(2) The employer shall make a filed labor condition application and necessary supporting documentation (as identified under this subpart) available for public examination at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the labor condition application is filed with ETA.

(3) The employer then may submit a copy of the certified labor condition application to INS with a completed petition (INS Form I-129) requesting H-1B classification.

(4) The employer should not allow the nonimmigrant worker to begin work, even though a labor condition application has been certified by DOL, until INS grants the worker authorization to work in the United States for that employer.

(5) The employer shall develop sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its labor condition application and the accuracy of information provided in the event that such statement or information is challenged. The employer shall also maintain such documentation at its principal place of business in the U.S. and shall make such documentation available to DOL for inspection and copying upon request.

§ 655.710 Complaints.

Complaints concerning misrepresentation in the labor condition application or failure of the employer to meet a condition specified in the application shall be filed with the Administrator,

Wage and Hour Division (Administrator), ESA, according to the procedures set forth in subpart I of this part. The Administrator, either pursuant to a complaint or otherwise, shall investigate where appropriate, and after an opportunity for a hearing, assess appropriate sanctions and penalties.

§ 655.715 Definitions.

For the purposes of subparts H and I of this part:

Actual wage means the wage rate paid by the employer to all individuals with experience and qualifications similar to the H-1B nonimmigrant's experience and qualifications for the specific employment in question at the place of employment. The actual wage established by the employer is *not* an average of the wage rates paid to all workers employed in the occupation.

Administrative Law Judge (ALJ) means an official appointed pursuant to 5 U.S.C. 3105.

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator under subpart H or I of this part.

Aggrieved party means a person or entity whose operations or interests are adversely affected by the employer's alleged non-compliance with the labor condition application and includes, but is not limited to:

(1) A worker whose job, wages, or working conditions are adversely affected by the employer's alleged non-compliance with the labor condition application;

(2) A bargaining representative for workers whose jobs, wages, or working conditions are adversely affected by the employer's alleged non-compliance with the labor condition application;

(3) A competitor adversely affected by the employer's alleged non-compliance with the labor condition application; and

(4) A government agency which has a program that is impacted by the employer's alleged non-compliance with the labor condition application.

Area of intended employment means the area within normal commuting dis-

tance of the place (address) of employment where the H-1B nonimmigrant is or will be employed. If the place of employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within normal commuting distance of the place of employment. (See definition of "place of employment.")

Attorney General means the chief official of the U.S. Department of Justice or the Attorney General's designee.

Authorized agent and *authorized representative* mean an official of the employer who has the legal authority to commit the employer to the statements in the labor condition application.

Certification means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Certify means the act of making a certification.

Certifying Officer and *Regional Certifying Officer* mean a Department of Labor official, or such official's designee, who makes determinations about whether or not to certify labor condition applications.

Chief Administrative Law Judge (Chief ALJ) means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

Department and *DOL* mean the United States Department of Labor.

Division means the Wage and Hour Division of the Employment Standards Administration, DOL.

Employer means a person, firm, corporation, contractor, or other association or organization in the United States:

(1) Which suffers or permits a person to work within the United States;

(2) Which has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee; and

(3) Which has an Internal Revenue Service tax identification number.

Employment and Training Administration (ETA) means the agency within the